



Security Clearance Adjudication

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Overview

- Suitability Versus Security
- Purposes of Personnel Investigations
- Continuous Evaluation
- Personnel Security Standards
- CAF/PSAB Procedures
- Administrative Flexibilities
- Case Law Evolution



Suitability vs. Security

- ❑ Authority is delegated from OPM to the agency.
- ❑ Suitability sometimes called “fitness” and it looks to character and conduct of the person.
- ❑ Analytics similar but suitability does not consider potential risk to national security.
- ❑ Federal employees are subject to suitability determinations whether they hold a clearance or not.



Suitability vs. Security (cont.)

- ❑ Different underlying authority for adverse action; 5 CFR 731 not 5 CFR 752.

- ❑ Different legal standard (on appeal)...
 - “Efficiency of the service” by preponderant evidence rather than “clearly consistent with the interests of national security” by substantial evidence.



Suitability vs. Security (cont.)

- ❑ Though suitability determinations are usually associated with initial appointment, suitability reinvestigations are sometimes initiated later.
- ❑ Suitability adverse actions taken with 5 CFR 731 are only authorized during the first year.
- ❑ Adverse actions taken after that point, even if suitability related, must utilize 5 CFR 752.



Suitability vs. Security (cont.)

Suitability actions require traditional due process and full appeal rights with no deference to the employer on the merits of the suitability decision.

Written notice of the action articulating the reasons for it, availability of the material relied upon, the right to answer/reply to the decision maker (OPM or the agency), and the right to representation.

If the person is a current federal employee there is a 30 day (paid) notice period.



Suitability vs. Security (cont.)

The MSPB will not limit its review to the record but will instead review all aspects of the decision. See Chavez v. OPM, 6 MSPB 343, 6 MSPR 404 (1981) and Folio V Department of Homeland Security, 402 F.3d 1350, 105 LRP 14913 (Fed. Cir. 2005).



Litigation Considerations

2. USE 5 CFR 315.804 TO TERMINATE PROBATIONERS, IF POSSIBLE.

- Probationary employees removed for performance and conduct under 5 CFR 315.804 have more limited due process (no 30 day paid notice period and very limited MSPB jurisdiction).

- Consider whether your issues fit the broad language of 5 CFR 315.804 for termination of probationers.



Litigation Considerations

- 3. RELY ON THE APPLICANT'S INABILITY TO MEET THE TERMS OF THE TENTATIVE OFFER OF EMPLOYMENT TO WITHDRAW IT (RATHER THAN 731).**
- Applicants are not likely to have appeal rights or be entitled to due process requirements.

 - OPM's most recent suitability regulations attempt to limit MSPB jurisdiction on non-selections even when based on 731's suitability factors.

 - However, if employee's employment "eligibility is cancelled" based on suitability, or the employee is removed for being unsuitable, 731 is likely to apply.



Litigation Considerations

4. DECISIONS THAT CAN LEGITIMATELY BE CHARACTERIZED AS SECURITY DECISIONS SHOULD BE.

- ❑ On appeal of actions based on suitability, there is no deference to the merits of the suitability decisions.
- ❑ In contrast, the MSPB and the Federal Courts do not review the merits of security determinations. Egan v. Navy. On the other hand, the EEOC has demonstrated more willingness to consider the merits.



Suitability Practice Areas

Advising management on:

- Making hiring decisions where issues are identified (i.e.. rescinding offers & terminating probationers);
- How to analyze suitability issues that are referred from CAF for command resolution;
- How to assess and deal with suitability related issues requiring removal at some point after the first year (5 CFR 731 procedures are not available).
- Representing the Agency in appeals.



Purposes of Personnel Investigations & Clearances

- Access: Federal facilities and logical systems.

- Suitability.

- Access: to National Security/Classified Information.



Personnel Security

Trending following September 11, 2001...

- ↑ Eligibility required.
- ↑ Clearances required.
- ↑ Level of clearance required.
- ↓ Time to execute the process.



Personnel Security Programs

SECNAV INSTRUCTION M-5510.30

- ❑ Analysis is tied to the position and the access.
- ❑ Initial and **continued** access to classified information and assignment to sensitive national security duties.
- ❑ Loyalty, reliability, and trustworthiness **clearly consistent with the interests of national security**.
- ❑ No unfavorable security determinations without compliance with all procedural requirements. When in doubt, no eligibility/clearance grant.



Personnel Security Programs

- ❑ Categorizations/Sensitivity Designations:
Position...Investigations...Clearance
- ❑ Sensitivity designations affect investigative requirements.
- ❑ Potential risk to national security is the dominant part of the analytical criteria.



Position Sensitivity Designation

- ❑ Risk designations: High, Moderate, and Low.
- ❑ Sensitivity designations: Special-Sensitive (SS), Critical-Sensitive (CS), Non-Critical-Sensitive (NCS), and Non-Sensitive (NS).



Types of PSIs

- ❑ National Agency Check (**NAC**).
 - ❑ National Agency Check With Written Inquiries (**NACI**).
 - ❑ Access NACI (**ANACI**).
 - ❑ National Agency Check with Local Agency and Credit Checks (**NACLIC**).
 - ❑ Single Scope Background Investigation (**SSBI**).
 - ❑ Periodic Reinvestigation (**PR**).
 - ❑ (**RSI**) To follow up on allegations/issues identified in PSI.
- See SECNAV 5510.30 6-1** for a detail description of what each of these entail and what level of investigation is associated with each position sensitivity designation.



Personnel Security Investigations (PSI)

- ❑ The process typically utilizes a personnel security questionnaire (PSQ) (SF86). **The first part** of the SF86 questionnaire concerns past employment, education, places of residence, countries visited, and names and addresses of parents and siblings. **The second part** concerns more personal subjects such as mental health treatment, memberships in organizations, financial affairs and debts, alcohol and drug use, and all arrests and convictions.
- ❑ The applicant signs waivers authorizing access to medical, employment, financial, and other public and private records.



Personnel Security Investigations (PSI)

- ❑ Investigators use questionnaires as a **starting point** for their inquiries but are trained to perform a **self-directed inquiry**.
- ❑ Questions pertaining to sexual orientation and/or conduct are not permitted unless there it presents a legitimate security concern such as susceptibility to exploitation or lack of trustworthiness, reliability, or good judgment.



Personnel Security Investigations (PSI)

- ❑ The Office of Personnel Management (OPM) conducts or controls the conduct of DON personnel security investigations.
- ❑ DON's Central Adjudication Facility (DON CAF) on the Washington Navy Yard adjudicates security clearance eligibility. DON CAF is being BRAC'd to Fort Meade in 2011.
- ❑ DON CAF refers investigations with suitability issues to the employing command for adjudication and action (i.e. Public Trust Positions).



Clearance Levels

- Top Secret (**TS**).
- Secret / Confidential (**SC**).

Special Access Programs

- TS with Sensitive Compartmentalized Information (**SCI**).
- Single Integrated Operational Plan-Extremely Sensitive Information (**SIOP-ESI**).



Adjudication Process

- ❑ To ensure uniform application of national security standards the DON CAF is the single DON authority for personnel security adjudication.
- ❑ DON CAF adjudicators will weigh each case on **unique merits**.
- ❑ The eligibility/access determination will be the result of the careful weighing of a number of variables in an **overall, common sense, "whole person"** adjudication, reached by application of the evaluation criteria outlined in EO 10450 and 12968.
- ❑ All available information will be considered including both favorable and unfavorable.



Adjudication Process (cont.)

- ❑ The information considered should be assessed for **accuracy, completeness, relevance, importance, and overall significance.**
- ❑ Nature and seriousness of the past conduct, the age of the individual, the circumstances of the past conduct, circumstances surrounding the conduct, voluntariness of participation, motivation surrounding the conduct, and the absence or presence of rehabilitation in applying the adjudication guidelines.
- ❑ The preceding factors use past and present conduct to **assess risk** of adverse impact to national security matters.



Adjudication Process (cont.)

- ❑ The rationale underlying each unfavorable personnel security determination must be documented and maintained by DON CAF.
- ❑ Personnel Security Investigations, clearances and accesses are properly recorded in the it system called the Joint Personnel Adjudication System (**JPAS**).
- ❑ Eligibility does not expire and is not invalidated by overdue reinvestigations.



Personnel Security Standards

1. Involvement in activities which, or sympathetic association with persons who, unlawfully practice or advocate the overthrow or alteration of the U.S. Government by unconstitutional means.
2. Foreign influence concerns or close personal association with foreign nationals or countries.
3. Foreign citizenship (dual citizenship) or foreign monetary interests.



Personnel Security Standards (Cont.)

4. Sexual behavior that is criminal or reflects a lack of judgment or discretion.
5. Conduct involving questionable judgment, untrustworthiness, unreliability or unwillingness to comply with rules and regulations, or unwillingness to cooperate with security process.
6. Unexplained affluence or excessive indebtedness.



Personnel Security Standards (Cont.)

7. Alcohol or Illegal drug abuse.
8. Illegal or improper drug use/involvement.
9. Apparent mental, emotional or personality disorders(s).
10. Criminal conduct.



Personnel Security Standards (Cont.)

11. Noncompliance with security requirements.

- Engagement in outside activities which could cause a conflict of interest.
- Misuse of Information Technology Systems.



Continuous Evaluation!

- ❑ SECNAV Manual 5510.30 dated June 30, 2006 (DON Personnel Security Program) requires **continuous evaluation** and **reporting** of “**adverse information**”
 - ◆ Any information that adversely reflects on the integrity or character of an individual, which suggests that the individual’s ability to safeguard classified information may be impaired or that the individual’s access to classified information clearly may not be in the best interest of national security.



Responsibilities

- ❑ Commanding Officers – establish and administer a continuous evaluation program
 - ❑ Forward disqualifying information to DON CAF.
 - ❑ Suspend access when warranted.
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- ❑ Supervisors & Managers – early detection of an individual's problems and maintain balance between an individual's needs and national security requirements.



Responsibilities (Cont.)

Individuals must:

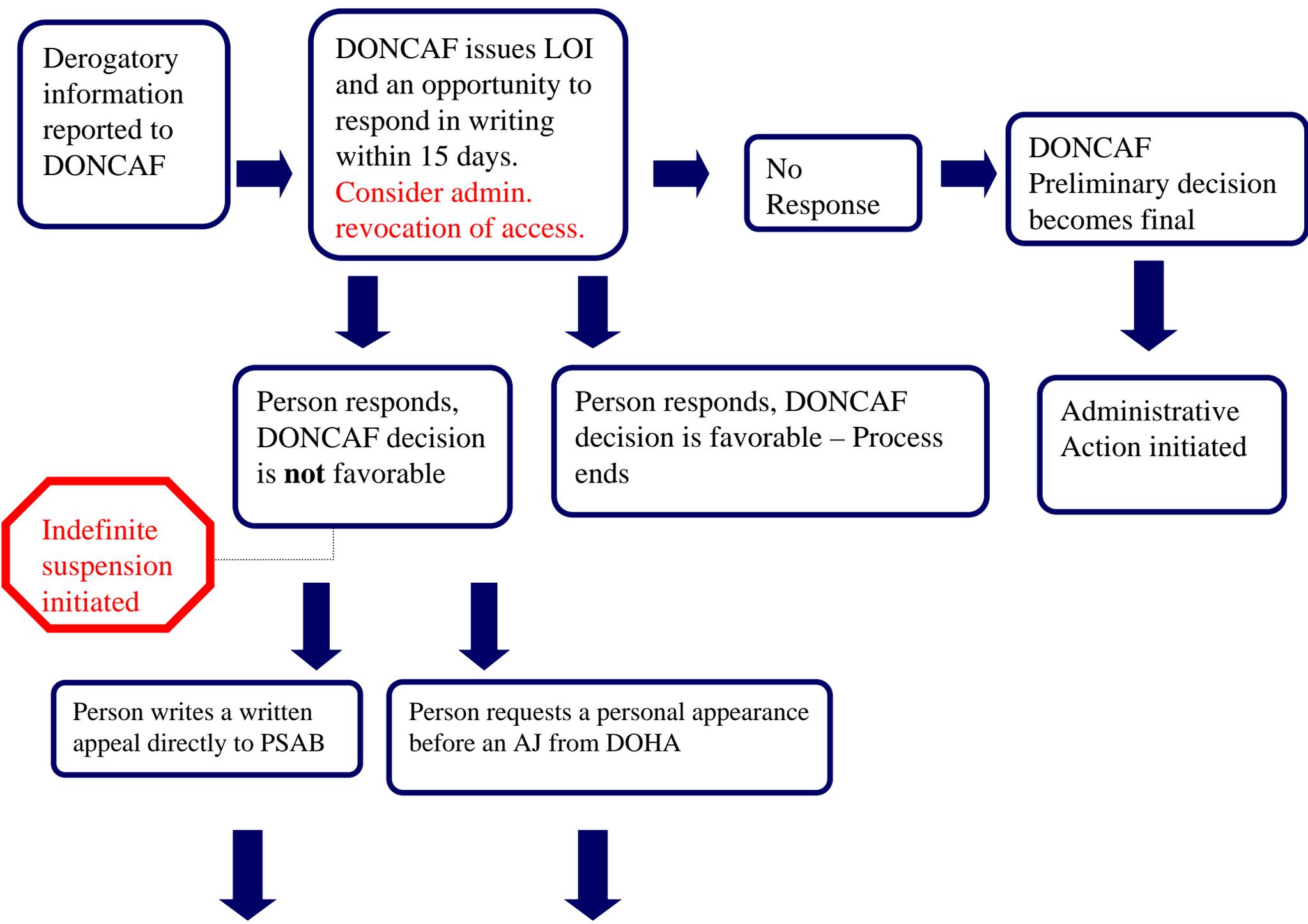
--complete security training, briefings, debriefings;

--adhere to the standards of conduct and avoid personal behavior that could render them ineligible for access or assignment;

--advise their supervisor or security manager when they become aware of information with potentially serious security significance regarding someone with access to classified information or assignment to sensitive duties.



Clearance Revocation Appeals Process



Person writes a written appeal directly to PSAB



Favorable decision – employee returned to work

Unfavorable decision – removal action initiated while on indefinite suspension

Person requests a personal appearance before an AJ from DOHA



Recommendation sent to PSAB



Favorable decision – employee returned to work

Unfavorable decision – removal action initiated while on indefinite suspension



Letter of Intent (LOI) to Revoke

- LOI affords the required “Minimum Due Process”

- Specific identification of derogatory information.

- Provides applicable personnel security guidelines.

- Identifies, if applicable, conditions which may mitigate security concerns.



Letter of Intent (LOI) to Revoke

- ◆ Revoke Security Clearance, Eligibility for Access to Sensitive Compartmented Information (SCI) and Eligibility for Assignment to a Sensitive Position.
- ◆ Command has a direct role in facilitating the process.
- ◆ Command immediately presents the LOI to the individual attempts to ascertain whether the individual intends to submit a response.
- ◆ The individual shall be informed by the command that they have **15 calendar days** to submit a written response.
- ◆ The Commanding Officer can grant an extension of 45 days provided DON CAF is notified of the extension. Following that extension requests are to be directed to DON CAF with valid justification.



Letter of Intent (LOI) to Revoke

- An immediate concern is whether access needs to be administratively revoked.
- If the access is temporary or interim the access must be immediately revoked.
- AWOL, Conviction of a criminal offense, or incarceration means access must be immediately revoked.

Decision Point!

- Propose Indefinite Suspension
- Administrative Leave.
- Reassignment to non-sensitive/non-classified work.



LOI Appeals Process

Employee has 3 options:

- ◆ Respond in writing to DONCAF via the Security Officer, or...
- ◆ Respond in writing via Security Officer requesting the CO approve a time extension.
- ◆ No response. Failure to timely respond results in the preliminary decision becoming immediately final and forfeiture of all appeal rights.



Letter of Denial (LOD)

- ❑ The DON CAF will adjudicate the individual's response to the LOI, and provide eligibility or denial, within 30 calendar days of receipt.
- ❑ The DON CAF LOD will identify which unfavorable factors, if any, were successfully mitigated, by the individuals response to the LOI.
- ❑ It will likewise identify which unfavorable factors remain to cause the unfavorable determination.



LETTER OF DENIAL (LOD)

Decision Point!

- Reassignment
- Administrative Leave
- Propose Indefinite Suspension
- Propose Removal (where employee elects not to appeal)



Administrative Flexibilities

Administrative Leave

- ◆ Costly
- ◆ Not a long term solution
- ◆ Removes employee from site immediately
- ◆ Likely to draw disparate treatment allegations
- ◆ Best to grant only during notice period preceding indefinite suspension

Temporary reassignment of duties

- ◆ Not a long term solution
- ◆ Employee is still productive
- ◆ Employee is still on site
- ◆ Not required by policy
- ◆ Potential to draw disparate treatment allegations



Administrative Flexibilities (Cont.)

□ Indefinite Suspension

- ◆ Places employee in a temporary status without duties and pay pending investigation, inquiry, or further agency action.
- ◆ Temporary suspension of access by CO awaiting DONCAF LOI, LOD letter.



Advantages of Indefinite Suspension

- Person remains on indefinite suspension through removal process, if necessary.
- No entitlement to back pay if security clearance reinstated.
- Proceed with removal if employee appeals fail.



Disadvantages of Indefinite Suspension

- ◆ Adverse Action appealable to MSPB
 - Position requires clearance or access
 - Clearance or access has been denied or revoked
 - Minimum due process was provided
 - Reassignment was not feasible (ONLY if agency regulations/policies require)
- ◆ Due Process
 - Minimum of 30 days (typically admin. Leave)
 - Notice, Opportunity to Respond, Decision
 - If the clearance has not been revoked you will have to detail the reasons why you believe it will be. Stoyanov v. Navy, Cheney v. DOJ, King v. Alston.



DOHA/PSAB

- ❑ Defense Office of Hearings and Appeals (DOHA) – provides for written appeal or personal appearance before an Administrative Judge
 - ◆ Individuals desiring to present a personal appeal must request a DOHA hearing within 10 days of receipt of the LOD.
 - ◆ Hearing typically occurs within 30 days of request.
 - ◆ Counsel allowed.
 - ◆ No right to call or confront witnesses.
 - ◆ Agency does not attend but can submit position paper.
 - ◆ After hearing the AJ's recommendation forwarded to PSAB for final determination.



Personnel Security Appeals Board (PSAB)

- Personnel Security Appeals Board – a 3 member board gives final determination
 - ◆ No DON CAF employees allowed on PSAB.
 - ◆ Two members are not security professionals.
 - ◆ Decision is based solely on the record.
 - ◆ No communications with DON CAF or the appellant only the command and security managers.
 - ◆ If the PSAB rules for denial or revocation reconsideration is not possible for 12 months.



PSAB Upholds Revocation

- ❑ 5 CFR 752 removal for failure to maintain a condition of employment.
- ❑ Of course, All 752 due process and advance notice requirements apply!
- ❑ MSPB or EEOC appeal may follow adverse action.



Personnel Security Practice Areas

Advising management:

- On security clearance eligibility or access restriction (including indefinite suspensions and the appeals process).
- On the granting/denying or supporting/contesting the grant of extensions of time to the appellant.
- On the business reasons for a reassignment vice indefinite suspension.
- On how to persuasively articulate the reasons why the revocation should be reversed/upheld to the DON CAF adjudicator, DOHA Administrative Judge, or the PSAB (position paper).



Practice Tips

- ❑ The value of a command perspective on the PSAB deliberations cannot be overstated...Commands are strongly encouraged to submit a position paper directly to the PSAB.
- ❑ In preparing this position paper address the disqualifying issues in light of the factors discussed on the adjudication slides.
- ❑ Do not remove employee before clearance revocation appeal process is finished!



Reciprocity

- ❑ Previously conducted federal government investigations will not be duplicated when they meet the scope and standards for the level required.
- ❑ Adjudicative organizations will review non-DOD determinations for satisfaction of adjudicatory requirements.
- ❑ New investigations will be fully justified. The content will not be requested unless good cause dictates.



Trends And Current Litigation

- EEOC.
- Crumpler and similar cases test the scope of Egan in Federal Court.
- MSPB, OPM, and the Current Administration.



QUESTIONS?



Case Law Evolution



Department of the Navy v. Egan,

484 U.S. 518, 88 FMSR 7009 (MSPB 1988)

- An employee does not have a property right or a liberty interest in a clearance
- Denial of a clearance is not an adverse action
- MSPB will not review the merits of an agency decision to revoke a clearance



Cheney Continued

- ❑ MSPB can only determine:
 - 1) Whether a clearance was denied;
 - 2) Whether the clearance was a requirement of the position;
 - 3) Whether the procedures in 5 USC 7513 were followed.



1985

1. Where an individual loses the security clearance required for the position he held prior to a reversed removal action, the agency can assign the employee to a different position with similar duties that does not require a security clearance. *Marcotrigiano v. Department of Justice*, 95 MSPR 198, 103 LRP 37860 (MSPB 2003), citing *LaBatte v. Department of the Air Force*, 58 MSPR 586, 93 FMSR 5326 (MSPB 1993) and *Gray v. Department of the Navy*, 29 MSPR 281, 85 FMSR 5450 (MSPB 1985).



1987

1. If an agency makes a final determination that an indefinitely suspended employee lacks the necessary security clearance to perform the duties of his job, the agency may propose his removal or take any other appropriate action. However, it must take such action within a reasonable period of time after resolution of the employee's security clearances. *Romero v. Department of Defense*, 104 MSPR 245, 106 LRP 71609 (MSPB 2006), citing *Campbell v. Defense Logistics Agency*, 31 MSPR 691, 86 FMSR 5355 (MSPB 1986), aff'd, 833 F.2d 1024 (Fed. Cir. 1987).



1988

1. The MSPB has no authority to review the merits of a security clearance determination.
Department of the Navy v. Egan, 484 U.S. 518, 88 FMSR 7009 (MSPB 1988); *Cheney v. Department of Justice*, 479 F.3d 1343, 107 LRP 10841 (Fed. Cir. 2007).
2. An employee does not have a property right to or a liberty interest in a security clearance.
Jones v. Department of the Navy, 978 F.2d 1223, 92 FMSR 7028 (Fed. Cir. 1992);
Department of the Navy v. Egan, 484 U.S. 518, 88 FMSR 7009 (U.S. 1988).



1988 Continued

3. The MSPB is not authorized to review an agency's determination that a particular piece of information should be classified for national security reasons. *Croft v. Department of the Air Force*, 40 MSPR 320, 89 FMSR 5217 (MSPB 1989), citing *Department of the Navy v. Egan*, 484 U.S. 518, 88 FMSR 7009 (MSPB 1988).
4. A denial of a security clearance is not an adverse action, and therefore by its own force is not subject to MSPB review. *Department of the Navy v. Egan*, 484 U.S. 518, 88 FMSR 7009 (U.S. 1988).



1988 Continued

5. The MSPB is not authorized to review the merits of an agency decision to revoke a security clearance. *Department of the Navy v. Egan*, 484 U.S. 518, 88 FMSR 7009 (MSPB 1988); *Cheney v. Department of Justice*, 479 F.3d 1343, 107 LRP 10841 (Fed. Cir. 2007).
6. The MSPB will not review claims of disparate treatment in the denial or revocation of a security clearance. *Woroneski v. Department of the Navy*, 39 MSPR 366, 88 FMSR 5490 (MSPB 1988).



1988 Continued

7. In cases where an adverse action is taken in response to the loss of a security clearance, the MSPB is authorized to determine whether: 1) the position occupied by the employee was one that required its incumbent to possess a security clearance; 2) the employee's security clearance was, in fact, revoked; 3) the employee could have been reassigned to a vacant position that did not require a security clearance. Nothing in 5 USC 7513, however, directs or empowers the MSPB to go further. *Department of the Navy v. Egan*, 484 U.S. 518, 88 FMSR 7009 (U.S. 1988); *Norrup v. Department of the Navy*, 87 MSPR 444, 101 FMSR 5089 (MSPB 2001); *Harpole v. Office of Personnel Management*, 98 MSPR 232, 105 LRP 10741 (MSPB 2005).



1988 Continued

8. An employee who is removed for "cause" under 5 USC 7513, when his required clearance is denied, is entitled to the several procedural protections specified in that statute. The MSPB then may determine whether such cause existed, whether in fact clearance was denied, and whether transfer to a nonsensitive position was feasible. *Department of the Navy v. Egan*, 484 U.S. 518, 88 FMSR 7009 (U.S. 1988); *Cheney v. Department of Justice*, 479 F.3d 1343, 107 LRP 10841 (Fed. Cir. 2007).



1989

1. Absent an agency policy to the contrary, during a security clearance investigation, an agency is not required to temporarily assign an employee to another position rather than impose an indefinite suspension. *Torrance v. Department of the Navy*, 50 MSPR 254, 91 FMSR 5531 (MSPB 1991); *Pangarova v. Department of the Army*, 42 MSPR 319, 89 FMSR 5417 (MSPB 1989).
2. The determination of whether a position should require that its incumbent hold a security clearance is not open to review by the MSPB. *Skees v. Department of the Navy*, 864 F.2d 1576, 88 FMSR 7039 (Fed. Cir. 1989); *Kriner v. Department of the Navy*, 61 MSPR 526, 94 FMSR 5162 (MSPB 1994).



1989 Continued

3. An agency's effort to find an employee nonsensitive work after the revocation of her security clearance does not prevent it from subsequently suspending her for losing her security clearance or give her any vested interest in her interim duties. *Moody v. Department of Defense*, 2007-3177, 107 LRP 47617 (Fed. Cir. 08/14/07, unpublished), citing *Skees v. Department of the Navy*, 864 F.2d 1576, 88 FMSR 7039 (Fed. Cir. 1989).
4. If an agency policy or regulation requires the reassignment of employees who lose security clearances to other vacant positions, the MSPB is authorized to review the agency's efforts to comply with this requirement. *Lyles v. Department of the Army*, 864 F.2d 1581, 88 FMSR 7037 (Fed. Cir. 1989).



1989 Continued

5. The MSPB is not authorized to review allegations of prohibited discrimination and reprisal when such affirmative defenses relate to the revocation of a security clearance. *Pangarova v. Department of the Army*, 42 MSPR 319, 89 FMSR 5417 (MSPB 1989).



1991

1. In order to support an indefinite suspension based on the temporary loss of an employee's security clearance or access to a classified area or material, the agency must establish that: 1) the employee occupies a position requiring such clearance or access; 2) the clearance or access has been suspended; 3) the employee has been suspended from duty indefinitely; 4) the indefinite suspension of the employee has a "condition subsequent;" i.e., a defined end point, such as conclusion of the security clearance investigation and a final determination as to whether it will be restored. *King v. Alston*, 75 F.3d 657, 96 FMSR 7003 (Fed. Cir. 1996); *Jones v. Department of the Navy*, 48 MSPR 680, 91 FMSR 5412 (MSPB 1991).
2. The MSPB does not have the authority to review the merits of an Agency's decision to classify a position as non-critical sensitive. *Brady v Dep't of the Navy*, 50 MSPR 133,138 (1991).



1992

1. An employee does not have a liberty or property interest in access to classified information. *Robinson v. Department of Homeland Security*, 107 LRP 50544 (Fed. Cir. 08/30/07), citing *Jones v. Department of the Navy*, 978 F.2d 1223, 92 FMSR 7028 (Fed. Cir. 1992).
2. Completion of an investigation into whether an employee's security clearance should be revoked is an appropriate condition subsequent for an indefinite suspension. *Romero v. Department of Defense*, 104 MSPR 245, 106 LRP 71609 (MSPB 2006), citing *Jones v. Department of the Navy*, 978 F.2d 1223, 92 FMSR 7028 (Fed. Cir. 1992).
3. An employee who is returned to duty with a restored security clearance after being on indefinite suspension during the investigation is not entitled to back pay. *Jones v. Department of the Navy*, 978 F.2d 1223, 92 FMSR 7028 (Fed. Cir. 1992).



1994

1. The MSPB will not review claims of disability discrimination in the suspension or revocation of a security clearance. *Hinton v. Department of the Navy*, 61 MSPR 692, 94 FMSR 5222 (MSPB 1994).
2. An agency is not required to provide an employee who is suspended without pay with a deadline for when it will complete an investigation and render a decision on his security clearance. *Smallwood v. Department of the Navy*, 62 MSPR 221, 94 FMSR 5213 (MSPB 1994).
3. The MSPB is authorized to review a claim that an employee was not actually working in a position requiring a security clearance. *West v. Department of the Navy*, 63 MSPR 86, 94 FMSR 5305 (MSPB 1994).



1996

1. The MSPB is authorized to determine whether an agency provided the minimal due process required by 5 USC 7513(b) in placing an employee on indefinite suspension or enforced leave. *King v. Alston*, 75 F.3d 657, 96 FMSR 7003 (Fed. Cir. 1996).
2. Under 5 USC 7513, an agency must give an employee written notice stating the specific reasons for the suspension of his security clearance when that is the reason for suspending the employee pending a decision on the security clearance. The notice must provide the employee with an adequate opportunity to make a meaningful reply to the agency before being suspended. *King v. Alston*, 75 F.3d 657, 96 FMSR 7003 (Fed. Cir. 1996); *Cheney v. Department of Justice*, 479 F.3d 1343, 107 LRP 10841 (Fed. Cir. 2007).



1999

1. The MSPB lacks authority to review security clearance determinations as personnel actions in the context of an IRA or whistleblower retaliation claim. *Hesse v. Department of State*, 217 F.3d 1372, 100 FMSR 7018 (Fed. Cir. 2000); *Roach v. Department of the Army*, 82 MSPR 464, [99 FMSR 5263](#) (MSPB 1999).



2000

1. The MSPB can only determine whether a security clearance was denied, whether the security clearance was a requirement of the appellant's position, and whether the procedures set forth in 5 USC 7513 were followed. *Cheney v. Department of Justice*, 479 F.3d 1343, 107 LRP 10841 (Fed. Cir. 2007), citing *Hesse v. Department of State*, 217 F.3d 1372, 100 FMSR 7018 (Fed. Cir. 2000).



2000 Continued

1. The revocation of a security clearance does not implicate constitutional procedural due process concerns. *Robinson v. Department of Homeland Security*, 107 LRP 50544 (Fed. Cir. 08/30/07), citing *Hesse v. Department of State*, 217 F.3d 1372, 100 FMSR 7018 (Fed. Cir. 2000).
2. Absent an agency policy or regulation requiring the reassignment of employees who lose security clearances to other vacant positions, an agency is under no obligation to do so. *Hesse v. Department of State*, 82 MSPR 489 (MSPB 1999), aff'd, 217 F.3d 1372, 100 FMSR 7018 (Fed. Cir. 2000).



2005

1. While the MSPB cannot examine the substance of an agency's decision not to grant an appellant a security clearance, it can determine whether the agency failed to return the appellant to duty in good faith. *King v. Department of the Navy*, 98 MSPR 547, 105 LRP 21585 (MSPB 2005).
2. The MSPB can consider a statement of reasons for a proposed security clearance revocation as evidence in an appeal of a disability retirement decision. *Harpole v. Office of Personnel Management*, 98 MSPR 232, 105 LRP 10741 (MSPB 2005).



2005 Continued

3. When an administrative judge dismisses without prejudice an appeal of a security clearance revocation because the agency has not yet completed its investigation, he cannot set a refiling date that is solely contingent upon the agency's issuing a final decision on the appellant's appeal of the revocation of his security clearance. Dismissals without prejudice should avoid open-ended periods for resolving appeals and should, instead, set a date certain by which the appellant must refile the appeal. *Schulte v. Department of the Air Force*, 100 MSPR 141, 105 LRP 49542 (MSPB 2005).



2007

1. An employee who was indefinitely suspended due to suspension of his security clearance is entitled to back pay if he was improperly suspended because the agency failed to meet the procedural requirements of 5 USC 7513. *Cheney v. Department of Justice*, 479 F.3d 1343, 107 LRP 10841 (Fed. Cir. 2007).
2. Security clearance decisions are not reviewable for minimum due process protection. *Robinson v. Department of Homeland Security*, 107 LRP 50544 (Fed. Cir. 08/30/07).



2007 Continued

3. The opportunity an employee may have for access to top secret or other classified information is not subject to due process procedural protections but rather is subject to the applicable statutes and regulations for issuing and revoking such clearances. *Robinson v. Department of Homeland Security*, 107 LRP 50544 (Fed. Cir. 08/30/07).

4. In an adverse employment action, such as removal, based on failure to maintain the security clearance required by the job description, the absence of a properly authorized security clearance is fatal to the job entitlement. *Robinson v. Department of Homeland Security*, 107 LRP 50544 (Fed. Cir. 08/30/07).



2007 Continued

5. An employee who was indefinitely suspended due to suspension of his security clearance is entitled to back pay if he was improperly suspended because the agency failed to meet the procedural requirements of 5 USC 7513. *Cheney v. Department of Justice*, 479 F.3d 1343, 107 LRP 10841 (Fed. Cir. 2007).



2007 Continued

Cheney v. DOJ, 479 F.3d 1343, 107 LRP 10841 (Fed. Cir. 2007)

□ An agency must give an employee written notice stating the specific reasons for the suspension of his security clearance when that is the reason for suspending the employee pending a decision on the security clearance. The notice must provide the employee with an adequate opportunity to make meaningful reply to the agency before being suspended.



2007 Continued

Robinson v. DHS, 498 F.3d 1361, 107 LRP 50544 (Fed. Cir. 08/30/07)

❑ Security clearance decisions are not reviewable for minimum due process protection. Because a Federal employee does not have a liberty or property interest in access to classified information, the revocation of a security clearance does not implicate constitutional procedural due process concerns.



2008

- When taking an adverse action based on a security clearance decision, an agency must provide an employee with the procedural protections required by 5 USC 7513 and any of its own regulations. If the agency does not follow its own regulations, an adverse action decision cannot be sustained by the MSPB if the employee can show "harmful error in the application of the agency's procedures in arriving at such decision." *Romero v. Department of Defense*, 108 LRP 32597, 527 F.3d 1324 (Fed. Cir. 2008).



2008

- ❑ An agency also must follow procedural due process protections established by its own regulations when it revokes an employee's security clearance. If the agency does not comply with its own procedural due process requirements, an adverse action decision cannot be sustained by the MSPB if the employee can show "harmful error in the application of the agency's procedures in arriving at such decision." *Romero v. Department of Defense*, 108 LRP 32597 (Fed. Cir. 2008).



2009

- ❑ *Brown v. Department of Defense, 2009*
M.S.P.B. 32 (2009): Board issues non-binding decision equating Board review of an adverse action based on disqualification from eligibility for assignment to a “non-critical sensitive” position with revocation of security clearance.
- ❑ Split decision with only two Board members so Initial Decision upheld.
- ❑ Currently before Court of Appeals for the Federal Circuit.



2009

- ❑ *Conyers v. DOD, Docket No. CH-0752-09-0925-1-1*: Appeal of Indefinite Suspension of a GS-5 Accounting Technician from her non-critical sensitive position based on denial of access to classified or sensitive information.
- ❑ Dismissed without prejudice pending decision in *Brown*.
- ❑ *Crumpler v DOD*: Same issue as *Brown*. Board vacated and reopened its decision requesting amicus briefs. Case settled.



EEOC

- ❑ The complainant will need to establish that the Agency is applying the security rules in a discriminatory manner. Are the comparators truly similarly situated? *Thierjung v. Defense Mapping Agency*, 1989 WL 10006480 (November 2, 1989).
- ❑ *Issacson v. Dep't of the Air Force*, 1998 WL 91940 (EEOC February 24, 1998).
- ❑ *Chatlin v. Dep't of the Navy*, 1990 WL 711568 (EEOC June 1, 1990).
- ❑ *Baker v. Dep't of the Air Force*, 2009 WL 1904962 (EEOC June 23, 2009).



EEOC

- ◆ EEOC has demonstrated willingness to delve into security matters where there is a allegedly a discriminatory security clearance revocation and a discriminatory removal or other adverse action.
- ❑ Pecuniary damages: \$141,237.72
- ❑ Non-pecuniary damages: \$200,000
- ❑ Attorney fees: \$199,492.89
- ❑ Costs: \$11,557.02
- ❑ Grand Total: \$552,287.63

Fonda-Wall v. Dep't of Justice, 2009 WL 3017634
(E.E.O.C June 28, 2009).